DRAFT REPORTER'S NOTES AND INTRODUCTION TO
PROPOSED AMENDMENTS TO THE
MASSACHUSETTS RULES OF CIVIL PROCEDURE REGARDING
DISCOVERY OF ELECTRONICALLY STORED INFORMATION

INTRODUCTION

In 2008, the Honorable Fredric D. Rutberg, chair of the Standing Advisory Committee on the Rules of Civil Procedure of the Supreme Judicial Court (Standing Advisory Committee), appointed a subcommittee to review the rules of the Federal Rules of Civil Procedure that dealt with discovery of electronically stored information in litigation. The subcommittee was asked to consider whether amendments to the Massachusetts Rules of Civil Procedure would be appropriate. The subcommittee was chaired by Francis H. Fox, Esq., and members of the subcommittee were Christine P. Burak, Esq., Theresa Finn Dever, Esq., Christopher A. Duggan, Esq., Gordon P. Katz, Esq., and Marc G. Perlin, Esq.

The driving force behind the decision to consider rules for electronic discovery in Massachusetts is the staggering growth of information in electronic form today. In preparing draft electronic discovery rules, the subcommittee drew on two primary sources: the 2006 amendments to the Federal Rules of Civil Procedure that addressed electronically stored information and the 2007 Uniform Rules Relating to the Discovery of Electronically Stored Information (National Conference of Commissioners on Uniform State Laws). Helpful comments on the background that fueled the decision to amend the Federal Rules and to adopt Uniform Rules can be found in the Advisory Committee Notes to the 2006 Federal Rules amendments and the Comments to the Uniform Rules.

The following excerpts from the Prefatory Note that accompanied the Uniform Rules illustrate the scope of the problems created by electronically stored information and the litigation process. Footnotes from the following excerpts have been deleted.

"With very few exceptions, when the state rules and statutes concerning discovery in civil cases were promulgated and adopted, information was contained in documents in paper form. Those documents were kept in file folders, filing cabinets, and in boxes placed in warehouses. When a person, business or governmental entity decided that a document was no longer needed and could be destroyed, the document was burned or shredded and that was the end of the matter. There was rarely an argument about sifting through the ashes or shredded material to reconstruct a memo that had been sent.

"In today's business and governmental world, paper is a thing long past. By some estimates, 93 percent or more of corporate information is being stored in some sort of digital or electronic format. This difference in storage medium for information creates enormous

problems for a discovery process created when there was only paper. Principal among these differences is the sheer volume of information in electronic form, the virtually unlimited places where the information may appear, and the dynamic nature of the information. These differences are well documented in the report of the Advisory Committee on the Federal Rules of Civil Procedure (Civil Rules Advisory Committee). The Civil Rules Advisory Committee recommended adoption of new Federal Rules to accommodate the differences:

> The *Manual for Complex Litigation (4th)* illustrates the problems that can arise with electronically stored information.
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> > The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.
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> Electronically stored information may exist in dynamic databases that do not correspond to hard copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers - including the simple act of turning a computer on and off or accessing a particular file - can alter or destroy electronically stored information, and computer systems automatically discard or overwrite as part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard copy materials. Electronically stored information may be "deleted" yet continue to exist, but in forms difficult to locate, retrieve or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery."

Over the course of two years, the subcommittee and the Standing Advisory Committee met on a regular basis to review and debate the myriad issues involved. Draft proposals were presented to the Standing Advisory Committee, considered, and rewritten.

After making a preliminary decision to move forward with a recommendation to adopt rules on electronic discovery, the Standing Advisory Committee also decided that it would be preferable to integrate any changes dealing with electronic discovery directly into the relevant existing rules of the Massachusetts Rules of Civil Procedure and rejected the alternative of promulgating a separate set of rules that would govern electronic discovery.

The Committee also discussed whether electronic discovery rules should be applicable to all Trial Court Departments or should be limited to those courts that regularly heard "larger" civil cases where the costs, time associated with, and burdens of, electronic discovery were perceived to be significant. The Committee ultimately decided that electronic discovery was a matter of concern in all courts of the Commonwealth, and concluded that the electronic discovery rules should be applicable to all trial courts in Massachusetts, and not be limited to courts such as the Superior Court.

The Standing Advisory Committee believes that the proposed amendments to the Massachusetts Rules of Civil Procedure reflect the goals that were identified in the Prefatory Note to the Uniform Rules describing the 2006 amendments to the Federal Rules of Civil Procedure: "to (1) provide early attention to electronic discovery issues, (2) provide better management of discovery into electronically stored information, (3) set out a procedure for assertions of privilege after production, (4) clarify the application of the rules relating to interrogatories and requests for production of documents to electronically stored information, and (5) clarify the application of the sanctions rules to electronically stored information."

There is a danger in attempting to describe "key" or "major" provisions of major rules changes, since any significant change in a rule has the potential to change the dynamic of litigation. But it is fair to say that a major focus of the Committee charged with recommending the 2011 amendments was crafting a process: (1) by which the parties, and the court if necessary, deal with electronic discovery early in the litigation, including the format for production of electronically stored information; (2) that addresses how to handle electronically stored information that is "inaccessible;" (3) that recognizes that privileged information may be inadvertently disclosed in the context of electronic discovery and sets forth a remedy for such disclosure; and (4) that provides protection where electronically stored information is lost by virtue of the "good-faith operation of an electronic information system." These matters are all addressed in the Reporter's Notes that accompany the 2011 amendments.

The Standing Advisory Committee recommends consideration of amendments to Mass. R. Civ. P. 16, 26, 34, 37, and 45. The Committee solicits and welcomes comments from the bar prior to presenting its recommendation to the Rules Committee of the Supreme Judicial Court.

Rule 16

PRE-TRIAL PROCEDURE: FORMULATING ISSUES

Draft Reporter's Notes--2011

The 2011 amendment is the first amendment to Rule 16 since the adoption of the Massachusetts Rules of Civil Procedure in 1973.

Rule 16 has been amended to add three discovery provisions to the listing of considerations at a pre-trial conference: (5) "The timing and extent of discovery;" (6) "The

preservation and discovery of electronically stored information;" and (7) "Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced." The items previously designated as (5) through (8) have been renumbered as (8) through (11). The new items are consistent with topics added to Rule 16 of the Federal Rules of Civil Procedure in 2006, and are appropriate items for a judge to consider in making a pre-trial order regarding discovery.

Rule 16 conferences that deal with discovery of electronically stored information may be of significant value to the parties and to the court. New item (6) makes specific reference to consideration at the pre-trial conference of matters relating to electronically stored information. Conferences with the court in cases involving discovery of electronically stored information may be particularly appropriate given the complexity and costs involved in electronic discovery.

Various court departments currently require a pre-trial conference and a scheduling order by virtue of Standing Orders or internal rules. The amendments to Rule 16 do not alter the language of Rule 16 that "a court may in its discretion" order such a conference. Courts that require pre-trial conferences by virtue of Standing Orders or internal rules should consider adding specific references to the three items that are now part of Rule 16.

Rule 26

GENERAL PROVISIONS GOVERNING DISCOVERY

Draft Reporter's Notes--2011

The 2011 amendments relating to electronically stored information have resulted in changes to Rule 26(b) and (f).

Rule 26(b).

The existing paragraph that had constituted Rule 26(b)(5) ("Claims of Privilege or Protection of Trial Preparation Materials: Privilege Log") was designated as 26(b)(5)(A), with no changes made to the text. Simultaneously, new provisions were added that have been designated as 26(b)(5)(B) and (C) to deal with information that was mistakenly produced in discovery and subject to a claim of privilege or protection.

The provisions of the first paragraph of Rule 26(b)(5(B) were adapted from Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. The provisions of the second paragraph of Rule 26(b)(5)(B) and Rule 26(b)(5)(C) were adapted from Rule 502 of the Federal Rules of Evidence. The language addresses concerns that have been raised about inadvertent waiver of a privilege or claim of protection for trial-preparation material that may result from production of materials in connection with discovery. The problem has become particularly acute in light of the increased likelihood that privileged and protected material can easily be inadvertently produced in discovery where the materials are embedded in voluminous material in electronic

format that has been turned over in discovery. But the language of the rule is not restricted to privilege or protection in connection with electronically stored information.

The Standing Advisory Committee decided that an appropriate place to add "clawback" provisions to the Massachusetts Rules was in Rule 26(b)(5), which prior to the 2011 amendment, dealt with privilege and privilege logs. A simultaneous amendment to Mass. R. Civ. P. 16 in 2011 also added this topic to the list of items to be discussed at a pretrial conference.

The Comment to Rule 9 of the Uniform Rules Relating to the Discovery of Electronically Stored Information aptly summarizes the scope of the problem as follows: "The risk of privilege waiver and the work necessary to avoid it add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver and the time and effort to avoid it can increase substantially because of the volume of electronically stored information and the difficulty of ensuring that all information to be produced has in fact been reviewed. This rule provides a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery and, if the claim is contested, permits any party that received the information to present the matter to the court for resolution...."

The Massachusetts version of the "clawback" rule provides that a party may present the information to the court for resolution pursuant to the provisions of the Uniform Rules on Impoundment Procedure, Trial Court Rule VIII. The cognate language in the federal rules uses "under seal" terminology that the Standing Advisory Committee thought to be less appropriate under Massachusetts practice.

Although Rule 26(b)(5)(B) sets forth a "clawback" provision, there is nothing in the rule that precludes the parties from modifying the procedures set forth in the rule to deal with information within the scope of a privilege or protection.

The language of Rule 26(b)(5)(C) provides that if the procedure is used and a court enters a written order upholding the privilege or protection, "the disclosure shall not be deemed a waiver in the matter before the court or in any other proceeding." Such an order is necessary to avoid a waiver of privilege or protection as to non-parties.

Rule 26(f).

Rule 26(f) is new and deals with conferences regarding electronically stored information.

The definition set forth in Rule 26(f)((1) that the term "inaccessible electronically stored information" is "information which is from sources where it cannot be retrieved without an unreasonable expense of time or money" is adapted from Federal Rule 26(b)(2)(B).

Unlike the Federal Rules of Civil Procedure and the Uniform Rules Relating to the Discovery of Electronically Stored Information, the Massachusetts version of Rule 26(f) does not require a conference between the parties as a matter of course (sometimes referred to as a "meet and confer" conference, although a telephonic conference may be permissible). The Massachusetts version, on the contrary, is a recognition that courts in Massachusetts may not

necessarily be set up to provide in all instances a right to a conference with the judge as a matter of course in all litigation at the early stages of litigation.

The approach taken by Rule 26(f), however, recognizes that a conference between the parties at the early stages of litigation will often be helpful where there may be discovery of electronically stored information. Thus, the Massachusetts rule has been drafted to encourage a meaningful conference between the parties to deal with electronically stored information.

The Massachusetts version is an attempt to foster communication between counsel on issues of electronic discovery in a court environment that is not set up, as is the case in the federal courts, to provide individual conferences or individual court management of litigation in all instances. A similar approach that did not adopt the federal model in full can be seen in the "Guidelines For State Trial Courts Regarding Discovery of Electronically-Stored Information," approved by the Conference of Chief Justices, August 2006 (available on the Internet at: http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf. See generally, Guideline 3 and the Comments that accompany Guideline 3.

Conference as of right. Under Rule 26(f)(2)(A), a party has a right to demand a conference with the other party by serving a written request for a conference "no later than 90 days after the service of the first responsive pleading" of a defendant. The term "pleading" as used in this rule is intended to reflect the definition of "pleading" as set forth in Rule 7(a). Thus, an answer of a defendant would be a pleading that would trigger the right to serve a request for a conference, whereas a motion to dismiss would not. The rule specifically provides that the request for a conference not be *filed* with the clerk's office, in an attempt not to overburden an already-beleaguered court system with additional filings. The conference must be held no later than thirty days from the date a party served the request.

Although the rule itself does not define the term "conference," the parties should not feel that they are required to meet in person. A conference by telephone or through electronic communication is satisfactory.

Conference by agreement. If there has been no request for a conference as of right within the 90-day period, Rule 26(f)(2)(B) allows a party to request a conference at a later point. Such a request should not be filed with the clerk's office. If the other parties to the case do not agree to such a conference, a party desiring a conference may move that the court conduct a conference under the provisions of Rule 16 to deal with matters relating to electronically stored information.

Purpose of conference; plan. Rule 26(f)(2)(C) sets forth the purpose of the conference, whether occurring as of right or by agreement of the parties-- to develop a plan that relates to discovery of electronically stored information. The rule sets forth a variety of topics that must be discussed at the conference, adapted from Rule 3 of the Uniform Rules Relating to the Discovery of Electronically Stored Information.

One matter that must be discussed at the conference is the preservation of electronically stored information. Given the practice that exists in many organizations of deleting or disposing

of electronic files after a set period of time, discussion of preservation may serve to avoid later disputes about the availability and expense of retrieving electronic information.

Within fourteen days after the conference, the parties must file with the court a plan that deals with electronically stored information. If the parties are not able to agree on certain issues, they shall file a statement so indicating. The parties must submit a plan to the court whether there was a conference as of right or by agreement, or by order of the court.

Electronically stored information orders. The language of Rule 26(f)(3) provides a court with discretion to enter an order relating to electronically stored information and sets forth the matters that may be addressed in such an order. These matters are drawn primarily from Rule 4 of the Uniform Rules Relating to the Discovery of Electronically Stored Information.

A court may enter an order after the parties have filed a plan, or upon motion or stipulation of the parties, or *sua sponte.* A court order may be entered whether or not the parties have conferred. If the parties have agreed about the method to assert or preserve a claim of privilege or protection (Rule 26(f)(3)(F)), the court order may so state.

Limitations on electronically stored information discovery. Rule 26(f)(4) is drawn from Rule 8 of the Uniform Rules Relating to the Discovery of Electronically Stored Information. It provides considerations for a judge to limit discovery of electronically stored information and to allocate the costs involved. Rule 26(f)(4) applies regardless of whether the parties have had a conference or not.

The philosophy behind Rule 26(f)(4) is similar to that of Federal Rule 26(b)(2)(B), reflecting a two-tiered approach to electronic discovery. Upon request, electronic discovery shall be produced, unless limited under Rule 26(f)(4)(E). However, a party believing that electronically stored information is "inaccessible" (as defined in Rule 26(f)(1)) may object to the discovery. In the event that there is a motion to compel the discovery, or a motion for protective order, the court will then determine whether to order the discovery. See Rule 26(f)(4)(C).

Rule 34

PRODUCTION OF DOCUMENTSAND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

Draft Reporter's Notes--2011

The 2011 amendments made some stylistic changes in Rule 34(a) so as to conform the rule to the format set forth in Rule 34(a) of the Federal Rules of Civil Procedure. In addition, the phrase "or electronically stored information" has been added to Rule 34(a)(1)(A), also in conformity with the cognate federal rule.

Formatting and stylistic changes have been made in Rule 34(b), again modeled after Rule 34(b) of the Federal Rules of Civil Procedure, but no substantive changes were intended. Language has been added to Rule 34(b)(1) to the effect that a request for production "may specify the form in which electronically stored information is to be produced."

Rule 34(b)(2)(B) and (C), modeled after Federal Rule 34(b)(2)(D) and (E), have been added to deal with responding to a request for production of electronically stored information and the important aspect of the form for producing such information.

Issues surrounding the production of electronically stored information, including the format for production, should be discussed by the parties in their conference regarding electronically stored information, if there is one. See Rule 26(f).

Rule 37

FAILURE TO MAKE DISCOVERY: SANCTIONS

Draft Reporter's Notes--2011

The 2011 amendments added section (f) to Rule 37. This section establishes a "safe harbor" provision that will preclude imposition of sanctions where electronically stored information "is lost as a result of the routine, good-faith operation of an electronic information system." It is taken from Rule 37(e) of the Federal Rules of Civil Procedure and Rule 5 of the Uniform Rules Relating to the Discovery of Electronically Stored Information.

Rule 45

SUBPOENA

Draft Reporter's Notes--2011

The 2011 amendments relating to electronically stored information have resulted in a number of changes to Rule 45.

References to "electronically stored information" have been added to Rule 45(b) and (d).

Existing Rule 45(f) (contempt) has been redesignated as Rule 45(g).

Rule 45(f), taken from Rule 45(d) of the Federal Rules of Civil Procedure, has been added. Rule 45(f) sets forth procedures applicable to producing documents, including electronically stored information.

Rule 45(f)(2) is modeled after Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure, but with the added proviso that a person subpoenaed need not prepare a privilege log, a recognition of the burden that otherwise would be imposed on a non-party claiming a privilege.

Rule 45(f)(2)(B), dealing with information mistakenly produced that is subject to a claim of privilege or protection, incorporates the "clawback" provisions and procedures set forth in Rule 26(b)(5)(B) and (C).